Supreme Court, U.S.
FILED
DEC 6 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-474

In the Supreme Court of the United States

OCTOBER TERM, 1985

PATRICK M. HYATT, ET AL., PETITIONERS

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

EDWIN S. KNEEDLER
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether, in this class action under 42 U.S.C. 405(g) challenging certain standards utilized by the Secretary of Health and Human Services in determining a claimant's entitlement to Social Security disability benefits, the district court had jurisdiction over the claims of class members who had not exhausted their administrative remedies.

2. Whether, in light of the requirement in 42 U.S.C. 405(g) that a claimant seek judicial review within 60 days of the Secretary's final decision on his claim for benefits, the district court had jurisdiction over the claims of class members who received a final decision of the Secretary more than 60 days before this class action was filed.

3. Whether, if the district court did not have jurisdiction under 42 U.S.C. 405(g) over the claims of class members who had not exhausted their administrative remedies or sought judicial review within 60 days of the Secretary's final decision, the district court could exercise jurisdiction under the mandamus statute, 28 U.S.C. 1361, to require the Secretary to reopen and readjudicate those claims.

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 43-56) is reported at 757 F.2d 1455. The opinion of the district court (Pet. App. 58-91) is reported at 579 F. Supp. 985.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1985, and petitions for rehearing were denied on April 23, 1985 (Pet. App. 57). On July

3, 1985, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 20, 1985 (Pet. App. 42), and the petition was filed on September 19, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This class action was brought in the United States District Court for the Western District of North Carolina on behalf of applicants for and recipients of Social Security disability benefits in North Carolina. The suit was commenced on August 5, 1983, by Patrick Hyatt as an individual action under 42 U.S.C. 405(g) following the Appeals Council's decision affirming the termination of his disability benefits (C.A. App. 6; Pet. App. 64). Hyatt added a class action allegation in the first amended complaint, filed on October 5, 1983 (C.A. App. 15). Subsequently, two other claimants, Herman Caudle and Mary Lovingood, were added as named plaintiffs (Pet. App. 65-69).

The plaintiffs contended that: (i) the Secretary could not terminate an individual's disability benefits without showing that his medical condition had improved; (ii) Social Security Ruling (SSR) 82-55 unlawfully deemed diabetes mellitus and hypertension "non-severe" impairments unless they were accompanied by end-organ damage (*i.e.*, damage to the heart, eyes, kidneys, or brain); and (iii) SSR 82-58 unlawfully provided that subjective complaints of pain would not be considered disabling unless supported by objective clinical findings (Pet. App. 61-62). The plaintiffs alleged that the latter two policies were inconsistent with *Martin* v. *Secretary of*

HEW, 492 F.2d 905 (4th Cir. 1974), and *Myers* v. *Califano*, 611 F.2d 980 (4th Cir. 1980), respectively, and they contended that the Secretary therefore had "non-acquiesced" in Fourth Circuit decisions with regard to pain, hypertension, and diabetes (Pet. App. 61-62; see also *id.* at 72-75). The plaintiffs made similar allegations of non-acquiescence in the Fourth Circuit's decision in *Dotson* v. *Schweiker*, 719 F.2d 80 (1983), with respect to the medical improvement issue (Pet. App. 62), even though the Fourth Circuit's decision in that case had not yet become final.

In an opinion dated February 14, 1984 (Pet. App. 58-61), the district court held that the Secretary was required by the doctrine of separation of powers to apply the rulings in *Martin*, *Myers* and *Dotson* in reviewing the disability claims of *all* persons residing in the Fourth Circuit, not merely the individual claimants involved in those cases (Pet. App. 84-91). The court then entered a broad injunction requiring the Secretary to follow *Martin*, *Myers* and *Dotson* within North Carolina; to follow Fourth Circuit precedent generally when implementing the Social Security Act in North Carolina; and to instruct all Social Security Administration (SSA) and state agency personnel to follow Fourth Circuit decisions. Pet. App. 92-94.

In its subsequent class certification order dated March 26, 1984 (Pet. App. 95-101), the district court included within the class: (i) all North Carolina residents whose claims involved hypertension, diabetes or pain and whose applications were denied or whose benefits were terminated on or after September 10, 1981; and (ii) all North Carolina residents whose benefits were terminated on or after October

6, 1982, without a finding of medical improvement. Both dates were far more than 60 days prior to August 5, 1983 (when Hyatt filed this suit under 42 U.S.C. 405(g)) and October 5, 1983 (when he sought to represent a class), but the district court made no effort to reconcile its class definition with the 60-day filing requirement in 42 U.S.C. 405(g).

Moreover, the district court included these individuals in the class and granted them relief whether or not they had exhausted their administrative remedies and obtained a "final decision" on their individual claims for benefits, as required by 42 U.S.C. 405(g). The court so ordered because, in its view, the plaintiffs' legal argument that the Secretary was required to follow Fourth Circuit precedent was collateral to their claims for benefits, the plaintiffs would not be adequately compensated by a retroactive award of benefits, and exhaustion of administrative remedies would be futile (Pet. App. 81-84).

2. While the Secretary's appeal was pending, Congress enacted the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 *et seq.* That Act had a significant impact on this case.

a. In Section 2 of the 1984 Act (98 Stat. 1794), Congress enacted a new statutory medical improvement standard to govern the determination of whether a recipient of disability benefits continues to be disabled. Section 2(d) of the 1984 Act directed that any case that was then pending in court and presented the medical improvement question was to be remanded to the Secretary for redetermination under the standards in the 1984 Act (98 Stat. 1797-1799). This remand requirement applied to all named and unnamed members of certified classes in pend-

ing class actions, whether or not the individual class members had personally satisfied the exhaustion and 60-day filing requirements in 42 U.S.C. 405(g). Pet. App. 47-48. The court of appeals accordingly ordered the remand to the Secretary of the cases of all of the class members whose benefits had been terminated. Pet. App. 47-51, 55. The court of appeals declined petitioners' request that the Secretary be instructed to follow Fourth Circuit precedent with respect to the evaluation of pain when readjudicating the claims remanded pursuant to Section 2 of the 1984 Act, because Congress had enacted a specific statutory standard for the evaluation of pain in Section 3(a) of the 1984 Act (98 Stat. 1799).

Although the 1984 Act did not specifically address the evaluation of hypertension and diabetes, the court of appeals also rejected petitioners' contention that the Secretary should be instructed to follow the Fourth Circuit's decision in *Martin* when evaluating the claims of terminated class members who have those conditions. The court observed that the House version of the 1984 Act would have required the Secretary to acquiesce in the decision of a court of appeals within the circuit unless the Secretary sought review in this Court, and the Senate bill would have required the Secretary to report to Congress and publish in the Federal Register any determination to non-acquiesce in a particular decision. But the court found it significant that Congress ultimately did not adopt any provision addressing the subject of non-acquiescence. In the court of appeals' view, Congress's decision in 1984 not to require the Secretary to follow circuit precedent was analogous to Congress's refusal to impose time limits on the adjudication of disability claims, which this Court considered in *Heckler* v. *Day*, No. 82-1371 (May 22,

1984). The court of appeals therefore concluded that the district court's injunction requiring the Secretary to apply the decisions of the Fourth Circuit in the adjudication of all disability claims in North Carolina constituted " 'an unwarranted judicial intrusion into this pervasively regulated area.' " Pet. App. 50, quoting *Day*, slip op. 15.

b. The court of appeals next addressed the claims of class members who had filed new applications for benefits but whose applications had been denied. The 1984 Act did not provide for the automatic remand of the cases of such claimants, and the court of appeals therefore found it necessary to consider whether those class members had satisfied the jurisdictional requirements of 42 U.S.C. 405(g). The court of appeals first held that the district court erred in concluding that this case fell within the exception to the exhaustion requirement recognized in *Mathews* v. *Eldridge*, 424 U.S. 319, 330-332 (1976), and *Heckler* v. *Ringer*, No. 82-1772 (May 14, 1984), slip op. 14-15, because petitioners' contention that the Secretary was applying improper standards in evaluating pain, diabetes, and hypertension was inextricably intertwined with the class members' claims for benefits. Pet. App. 50-51. The court of appeals also held that the 60-day filing requirement in Section 405(g) is jurisdictional in nature and that the district court therefore was without authority to include in the class any individuals who had obtained a final decision of the Secretary more than 60 days before this class action was commenced. Pet. App. 52.

In light of these jurisdictional holdings, the court of appeals ordered the district court to dismiss the claims of all new-applicant class members who did not satisfy the exhaustion and 60-day filing require-

ments in 42 U.S.C. 405(g). With respect to the new-applicant class members who did satisfy the jurisdictional requirements and whose claims involved allegations of pain, the court instructed the district court to remand their claims to the Secretary to be reconsidered in light of the new statutory pain standard in Section 3(a) of the 1984 Act. Although the 1984 Act did not specifically address hypertension and diabetes, the court of appeals concluded that the Secretary also should have an opportunity to reconsider the claims of new-applicant class members who had such impairments, in view of circuit precedent and the legislative history of the 1984 Act addressing the subject of non-acquiescence. Pet. App. 52-53.

DISCUSSION

1. The court of appeals correctly remanded to the Secretary, for reconsideration under Section 2 of the Social Security Disability Benefits Reform Act of 1984, the cases of those class members whose benefits had been terminated. In the course of the readjudication of their individual claims on remand, the class members will have the opportunity to present any factual and legal arguments they wish concerning the evaluation of pain, hypertension and diabetes mellitus, as well as any other issues that bear on their claims for benefits. The court of appeals' order directing the remand of these class members' cases is consistent with this Court's orders in essentially identical circumstances in *Heckler* v. *Kuehner*, No. 83-1593 (Nov. 5, 1984), and *Heckler* v. *Lopez*, No. 84-115 (Dec. 10, 1984). This aspect of the court of appeals' judgment therefore plainly does not warrant review.

2. The court of appeals also correctly held that the district court did not have jurisdiction under 42 U.S.C. 405(g) over the claims of any of the new-applicant class members who had not satisfied the exhaustion and 60-day filing requirements. However, as petitioners point out (Pet. 16-26), similar jurisdictional issues are presented in *Heckler* v. *City of New York*, cert. granted, No. 84-1923 (Oct. 7, 1985), and *Heckler* v. *Owens*, prob. juris. noted, No. 84-1905 (Oct. 15, 1985). We therefore suggest that the Court hold the petition in this case and dispose of it in light of the decisions in *City of New York* and *Owens*. This is the same course we have suggested in *Heckler* v. *Polaski*, No. 85-55, which also presents the question whether exhaustion of administrative remedies was required in a class action challenging the Secretary's approach to the evaluation of pain.

3. Petitioners argue (Pet. 8-16, 24) that the Court should grant plenary review on the jurisdictional issues in this case, rather than hold the petition pending the decisions in *City of New York* and *Owens*, because it involves allegations of non-acquiescence. For several reasons, that course is not warranted.

a. There is no class representative who has a live claim before the Court and who can present the necessary arguments on behalf of other class members. There were only three class representatives in this case: Patrick Hyatt, Herman Caudle, and Mary Lovingood. All three previously had been found to be disabled and raised the medical improvement issue (Pet. App. 63-70), and the claims of all three therefore were subject to Section 2(d) of the 1984 Act, which directed an automatic remand of their individual cases to the Secretary for redetermination.

The effect of the court of appeals' remand pursuant to Section 2(d) was to dissolve the class action status of this case insofar as it related to medical improvement (see Pet. App. 51) and thereby to eliminate the status of the named plaintiffs as representatives of a class of other claimants (especially new applicants).

That is not the only defect in the status of the class representatives. In light of the new pain standard in Section 3(a) of the 1984 Act, petitioners concede (Pet. 7-8 n.8) that the court of appeals correctly vacated the district court's injunction requiring the Secretary to follow the Fourth Circuit's decision in *Myers* regarding pain.[1] This leaves the question of the Secretary's approach to the evaluation of hypertension and diabetes. Only two of the three class representatives—Caudle and Lovingood—had such claims (both of which involved hypertension, not

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[1] The legislative history demonstrates that Congress intended in enacting Section 3(a) to ratify the Secretary's approach to the evaluation of pain that petitioners challenged in this case. See H.R. Conf. Rep. 98-1039, 98th Cong., 2d Sess. 29 (1984); S. Rep. 98-466, 98th Cong., 2d Sess. 23 (1984). In fact, the Senate Report severely criticized the courts that had not shown sufficient deference to the Secretary's regulatory authority to establish standards for the evaluation of pain (S. Rep. 98-466, *supra*, at 23), and the House Report likewise stated that "it is not appropriate for the Federal courts to establish policy on such an issue simply because the statute is insufficiently specific." H.R. Rep. 98-618, 98th Cong., 2d Sess. 14 (1984).

Although Congress has now emphatically endorsed the Secretary's approach and rejected that of a number of courts (necessarily including that of the Fourth Circuit in *Myers*, to the extent it could be construed to be inconsistent with the Secretary's approach), petitioners contend that the Secretary previously was constitutionally prohibited from even liti-

diabetes). See Pet. App. 63-70. However, on February 27, 1984, the ALJ reversed the state agency's decision and held that Lovingood continued to be disabled. Any objection Lovingood might previously have had to the Secretary's evaluation of hypertension therefore was rendered moot even before March 26, 1984, when the class was certified and she was designated as a class representative (*id.* at 95-97, 101).

Similarly, Herman Caudle died on October 24, 1983, before he was designated as a class representative (see Pet. App. 66-67, 97), and on May 3, 1984 the Appeals Counsel held that he had been disabled prior to his death. Any objection Caudle (or his widow) might previously have had to the Secretary's evaluation of hypertension was thereby also rendered moot. As a result, there is no class representative before the Court with standing to complain of alleged non-acquiescence by the Secretary in the Fourth Circuit's decision in *Martin*.

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gating that issue in the Fourth Circuit in light of *Myers* and that the district court properly issued an injunction that effectively prevented the Secretary from doing so. This extreme and rigid rule has no place in our constitutional system of separation of powers among co-equal Branches. In fact, the rule petitioners advocate is nothing more than a rule of non-mutual collateral estoppel against the federal government, which this Court unanimously rejected in *United States* v. *Mendoza*, 464 U.S. 154 (1984). See also *United States* v. *Estate of Donnelly*, 397 U.S. 286, 294-295 (1970). The legislative history of the 1984 Act demonstrates that Congress understood the relationship between *Mendoza* and the "non-acquiescence" issue and acknowledged the litigating considerations that weigh against a rule of mandatory acquiescence. See 130 Cong. Rec. S11454-S11455 (daily ed. Sept. 19, 1984) (remarks of Sen. Dole); S. Rep. 98-466, *supra*, at 21; H.R. Conf. Rep. 98-1039, *supra*, at 37-38.

b. Although the district court believed that the approach to the evaluation of hypertension reflected in SSR 82-55 was inconsistent with the Fourth Circuit's decision in *Martin* (Pet. App. 72-74, 86), the Secretary argued that the two in fact were consistent.[2] The court of appeals did not address the Secretary's contention. It instead vacated the broad injunction entered by the district court and remanded to the Secretary the cases of all of the new-applicant class members who raised the hypertension issue and satisfied the jurisdictional requirements of 42 U.S.C. 405(g). This case therefore does not present a concrete issue of non-acquiescence.

c. Even if the issue were presented in a concrete posture, allegations of non-acquiescence in an appellate decision regarding the evaluation of hypertension would not permit a court to dispense with the jurisdictional prerequisite that the claimant obtain a "final decision" before seeking judicial review pursuant to 42 U.S.C. 405(g). Only after the Secretary has rendered her final decision on any individual class

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[2] The Secretary pointed out that SSR 82-55 did not state that the Secretary would disregard Fourth Circuit precedent and that it therefore was quite different from the explicit statement of non-acquiescence involved in *Heckler* v. *Lopez*, *supra*. Appellants' Br. 16-18, 21-22. The Secretary further argued that *Martin* was distinguishable because it involved multiple impairments, whereas SSR 82-55 addressed the problem of hypertension or diabetes standing alone; that *Martin* was primarily concerned with the question whether substantial evidence supported the Secretary's decision; and that the Fourth Circuit had never held that SSR 82-55 or the regulations it implemented were invalid under the arbitrary and capricious standard of review required by *Heckler* v. *Campbell*, 461 U.S. 458, 466 (1983). Appellants' Br. 20-21, 23-27.

member's claim for benefits would it be clear how hypertension was evaluated and whether it even played a role in the Secretary's ultimate disposition of the claim. In this very case, for example, the only two named plaintiffs who suffered from hypertension were found to be disabled in the course of further administrative proceedings. The court of appeals therefore was clearly correct in concluding that petitioners' contention that the Secretary has applied an incorrect standard in evaluating hypertension did not fall within the narrow exception to the exhaustion requirement that was recognized by this Court in *Mathews* v. *Eldridge* and *Heckler* v. *Ringer* for issues that are "entirely" or "wholly" collateral to the substantive claim of entitlement to benefits.

It does not matter for these purposes that petitioners assert that, in their view, the Secretary was constitutionally obligated to follow a prior Fourth Circuit decision (*Martin*) that had taken a different approach. This Court made clear in *Weinberger* v. *Salfi*, 422 U.S. 749, 762-767 (1975), that even constitutional objections to the interlocutory denial of a claim on the merits cannot be presented to a court in an action under 42 U.S.C. 405(g) prior to full exhaustion of administrative remedies unless the *Secretary* has dispensed with the exhaustion requirement. The Secretary has not done so here.

d. In any event, circumstances have changed considerably since the time the district court entered its injunction, with the result that plenary review now is especially unwarranted:

First, in April 1985, HHS formally declared obsolete SSR 82-55, on which petitioners have premised their non-acquiescence argument with respect to the evaluation of hypertension. Social Security Adminis-

tration, Department of Health and Human Services, *Social Security Rulings*, SSR 85-III-II, at 47 (Apr. 1985).

Second, in Section 4 of the 1984 Act (98 Stat. 1800), Congress specifically addressed the authority of the Secretary to identify certain impairments as non-severe based on medical factors alone. The Fourth Circuit's criticism of that approach in its 12-year-old decision in *Martin* must now be considered by the Secretary in light of the intervening legislation.

Third, as petitioners acknowledge (Pet. 16), the Secretary adopted a new policy on the question of non-acquiescence in June 1985. See Interim Circular 185, reproduced at Pet. App. 35-40. Under the new policy, the Secretary will issue a formal SSR identifying each appellate decision that appears to be at variance with SSA policy and state how SSA will apply that decision within the circuit involved. Pet. App. 35-36. The Interim Circular also provides a mechanism for determining whether the Secretary will actually render a final decision on a claim for benefits under SSA policy rather than the different circuit rule. Pet. App. 36-40. We have been informed that SSA currently is conducting an exhaustive study of appellate decisions in order to identify areas of possible conflict with SSA policy, but that no formal SSRs identifying such areas have yet been promulgated. And even if such an SSR is issued at a later date with respect to a given circuit and issue, it would not be until the Appeals Council stage that the Secretary would make a final determination whether to apply the circuit rule in her decision on a particular claim for benefits. See Pet. App. 40. For these reasons, there is no ripe controversy in this

class action concerning possible future non-acquiescence by SSA in a court of appeals' decision. The new Interim Circular 185 also makes it particularly clear that petitioners are wrong in contending that exhaustion is not required simply because they allege "non-acquiescence" by the Secretary.[3]

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decisions in *Heckler* v. *Owens*, No. 84-1905, and *Heckler* v. *City of New York*, No. 84-1923, and then be disposed of in light of those decisions.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

DECEMBER 1985

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[3] But see *Stieberger* v. *Heckler*, 615 F. Supp. 1315 (S.D.N.Y. 1985), appeal pending, No. 85-6310 (2d Cir.).

☆ U. S. GOVERNMENT PRINTING OFFICE, 1985 491507 20074